Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.

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QUESTIONS PRESENTED

In *Davis v. FEC*, 554 U.S. 724 (2008), this Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates who are outspent by self-financed candidates. Arizona's Citizens Clean Elections Act achieves a similar result by providing extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The questions presented are:

1. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates?

2. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by such candidates' privately financed opponents?

PARTIES TO THE PROCEEDING

The Petitioners in No. 10-238 are the Arizona Free Enterprise Club's Freedom Club PAC, the Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy. The Petitioners in No. 10-239 are John McComish, Nancy McLain, and Tony Rouse.

Respondents in both cases are Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo, Royann J. Parker, Jeffrey L. Furman, Louis Hoffman, and Lori Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission; and the Clean Elections Institute, Inc.

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OPINIONS BELOW

The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is reported at 611 F.3d 510 and appears in the appendix to Petitioners' petition for a writ of certiorari ("App.") at App. 1-44. The decision of the U.S. District Court for the District of Arizona is unreported and appears at App. 45-78.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. The petition for a writ of certiorari was filed on August 17, 2010, and was granted on November 29, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Relevant portions of the Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.*, are reproduced at App. 134-49.

STATEMENT OF THE CASE

A. The Provisions and Operation of the Act

The Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.* (2010) (the "Act"), is a system of public financing for campaigns for Arizona state offices. The Act applies to races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative. The Act provides government funds to candidates who collect a sufficient number of $5 "qualifying contributions" from the public. The government provides a set amount of money—an "initial disbursement"—to qualifying candidates once they collect the qualifying contributions. Except for the qualifying contributions and other minor exceptions, candidates taking public money cannot accept any private contributions. Ariz. Rev. Stat. § 16-941(A)(1) (2010); App. 135. They also may not make expenditures above the initial disbursement. Ariz. Rev. Stat. § 16-941(A)(3-4) (2010); App. 135-36. In other words, the state conditions its disbursement of campaign funds on an agreement by the candidate to (i) not accept private contributions, and (ii) not spend above a government-set limit.

At issue in this case is a specific provision of the Act, Ariz. Rev. Stat. § 16-952(A-C) (2010) (the "Matching Funds Provision"), entitled "Equal Funding of Candidates." App. 138-41. This provision kicks in when (i) the spending of groups making independent expenditures, combined with (ii) the spending or

fundraising of privately financed candidates, is more than the amount a publicly financed candidate may spend under the Act's expenditure limits for participating candidates.[1] That is, the Matching Funds Provision comes into play when the spending of a publicly financed candidate's political opponents, added together, is more than the amount of the initial disbursement provided to the publicly financed candidate. We shall refer to the amount of the initial disbursement as the "trigger level" for independent expenditure groups and privately financed candidates. The government provides "matching funds"—or additional direct public subsidies—to the publicly financed candidate based on how much his or her political rival spends[2] above the trigger level. These matching funds can amount to up to two times the amount of the initial disbursement for each candidate who receives them. Ariz. Rev. Stat. § 16-952(E) (2010); App. 142-43.

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[1] As discussed further below, the Act adds the spending of independent expenditure groups and the contributions (in the general election) or spending (in the primary election) of a privately financed candidate to determine whether matching funds should be triggered.

[2] After the primary election is over, the Act switches from using the amount the privately financed candidate spends to using the amount the privately financed candidate receives in contributions to determine whether the trigger level has been reached. That is, the government does not issue matching funds based on the expenditures of a privately financed candidate in the general election, but rather does so based on how much that candidate receives in contributions during the entire election cycle.

The matching funds equal the amount spent by the independent expenditure group, plus the amount a privately financed candidate spent (in the primary election) or received (in the general election) over the trigger level, less 6% for fundraising expenses. Ariz. Rev. Stat. § 16-952(A) (2010); App. 138-39.

1. How Independent Groups Trigger Matching Funds

Independent expenditure groups trigger matching funds to each publicly financed candidate in a race when (i) they spend money in opposition to a publicly financed candidate or in favor of a privately financed candidate, and (ii) the total amount spent by an independent expenditure group plus the amount spent or received by the privately financed candidate exceeds the amount of the initial disbursement. Ariz. Rev. Stat. § 16-952(C)(1-3) (2010); App. 139-40. When an independent expenditure group's spending triggers matching funds, the government provides those funds directly to the publicly financed candidate or candidates in the race and not to independent expenditure groups supporting them. Independent expenditures on behalf of publicly financed candidates or against privately financed candidates do not trigger matching funds to privately financed candidates. *Cf. id.* An independent expenditure in support of a publicly financed candidate results in matching funds to other publicly financed candidates in the same race, however. Ariz. Rev. Stat. § 16-952(C)(3) (2010); App. 140.

For example, assume a race in which total spending by independent expenditure groups and privately financed candidates exceeds the trigger level. When an independent expenditure group spends an additional $10,000 in support of a privately financed candidate or against a publicly financed candidate, that spending results in an almost $10,000 governmental subsidy to each publicly financed candidate in the race. In contrast, a $10,000 independent expenditure on behalf of a publicly financed candidate results in no government money going to any privately financed candidates in that race, but would trigger matching funds to any other publicly financed candidates in the race.

The Act also treats independent expenditures that do not mention a privately financed candidate at all as spending in favor of the privately financed candidate. For instance, suppose a race with a publicly financed candidate (Candidate A) running against a privately financed candidate (Candidate B). When an independent expenditure group spends money on an advertisement against Candidate A, but does not endorse or even mention Candidate B in that advertisement, the Act provides matching funds directly to Candidate A (assuming the trigger level has been met). Thus, speech unrelated to the privately financed candidate can, and does, result in direct subsidies to her rival.

2. How Privately Financed Candidates Trigger Matching Funds

Privately financed candidates trigger matching funds to each publicly financed candidate in a race when they spend (in the primary election) or raise (in the general election) money in an amount above the government's initial disbursement, when combined with any independent spending in support of a privately financed candidate's election. Ariz. Rev. Stat. § 16-952(C) (2010); App. 139-41. While contributions can trigger matching funds only in the general election, the Act includes contributions received by the privately financed candidate throughout the entire election period, including the primary (less the amount of expenditures the privately financed candidate made in the primary exceeding the trigger level), to determine whether the trigger level has been reached. Ariz. Rev. Stat. § 16-952(B) (2010); App. 139. Thus, a privately financed candidate cannot create a "warchest" during the primary election for use in the general election without risking triggering matching funds to her publicly financed opponents in the general election.

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In considering how spending by either independent expenditure groups or privately financed candidates can trigger matching funds, the Act is structured so that an independent expenditure group's spending alone can trigger matching funds, even if the privately financed candidate in the race does not spend any money at all or does not receive any contributions. Likewise, a privately financed candidate's

spending (in the primary election) or contributions (in the general election) alone can trigger matching funds, even if there are no independent expenditures made in support of the privately financed candidate or against the publicly financed candidate in the race, so long as that privately financed candidate's spending or contributions exceed the trigger level.

3. The Act's Multiplier Effect

Although commonly referred to as "matching funds," that term does not accurately describe how the Matching Funds Provision actually works. The money distributed by the government to publicly financed candidates often does not "match," but instead substantially exceeds, the expenditures or contributions that triggered the subsidy.

This is because the Act provides a grant of the total matching funds subsidy to every publicly financed candidate running against a privately financed candidate. Ariz. Rev. Stat. § 16-952(A)-(B) (2010); App. 138-39. For example, assume a race (1) with one privately financed candidate and three publicly financed candidates, and (2) where the privately financed candidate has spent or raised over the trigger level. If an independent expenditure group makes an expenditure of $10,000 in support of the privately financed candidate in this race, then the government gives $10,000 (less 6%) directly to each publicly financed candidate. In other words, $10,000 worth of expenditures in support of a privately financed candidate

(who may not have wanted them) results in $28,200 worth of speech given to that candidate's opponents.

Moreover, if we assume a race in which the converse is true and there are three privately financed candidates and one publicly financed candidate, independent expenditures of $10,000 in favor of each privately financed candidate results in $28,200 in matching funds going to the sole publicly financed candidate in the race. The Matching Funds Provision can thereby make the publicly financed candidate into the best financed candidate in the race and one capable of outspending all his privately financed opponents combined.

B. The History of the Act

The Act was adopted by initiative in 1998 by a margin of 51% to 49%. App. 49. Its proponents primarily intended it to reduce political spending and negate the influence of groups with whom the proponents disagreed and whom they viewed as "special interests." The Act would achieve these goals by "leveling the playing field" among political actors in Arizona.

The proponents believed that the "field" was not "level" because of their disagreement with contemporary legislative outcomes and believed that if they were to reduce overall spending and equalize resources among political actors, this would allow them to achieve certain progressive policy goals. See, e.g., Joint Appendix (JA) at 213 (Jim Driscoll, who was one

of the earliest proponents of the Act, an initiative steering committee member, and an employee of the campaign to pass the Act, authored a series of reports critical of Arizona's public policies. ECF No. 288-4 at 22, 26, 38-50, 62-142. In these reports, he argued that until a system of public financing was in place, "no significant progress can be made to protect the environment, fund education, [or] provide adequate health care . . . ." ECF No. 288-4 at 132. To that end, Driscoll recruited a number of progressive groups to support the Act. ECF No. 288-4 at 27; 294-1 at 21, 123-30. The Act's primary author, and current member of the Clean Elections Commission, Respondent Louis Hoffman, testified that he and the Act's other proponents sought to reduce the influence and relative voice of certain business groups. JA 719-24.

Notably, the initiative's campaign manager, in a confidential memorandum to the initiative campaign's steering committee, made clear that "Clean Elections is NOT about public funding. Its [sic] about spending limits, getting rid of special interests, and leveling the playing field." JA 213. Documents authored by proponents of the Act repeatedly and consistently state that they intended the Matching Funds Provision to (1) limit spending by certain groups and privately financed candidates, and (2) "level the playing field" among political actors in Arizona. *See* JA 809-55 (chart summarizing hundreds of statements discussing leveling the playing field and limiting spending). Indeed, on its website, the Citizens Clean Elections Commission continues to

state that the purpose of the Act is to "level the playing field."[1]

One internal document from Respondent Clean Elections Institute, Inc. (CEI), written after the Act was passed, describes how the Matching Funds Provision works in practice. Entitled "Justification for Clean Elections Matching Funds," the document identifies the two main reasons for the Act's Matching Funds Provision: "fairness" and "limit[ing] spending." JA 109-10. Matching funds would achieve these goals by creating "disincentives" for privately financed candidates' expenditures:

> A traditional candidate may think twice about raising additional funds in a race against a Clean Elections candidate. For every dollar raised above the base amount, the CE candidate is matched. There is no incentive for the traditional candidate to raise and spend more, unless that candidate intends to outspend the CE candidate by going beyond three times the initial grant.
>
> . . .
>
> With the Clean Elections matching funds system, it can be argued that millions of dollars in spending never takes place.

[1] See http://www.azcleanelections.gov/about_us/get_involved.aspx (Respondent's website proclaims "The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office." (last visited Jan. 10, 2011)).

JA 110. As one campaign piece by Arizonans for Clean Elections directed at the public phrased it: "Candidates who chose to raise money by continuing to use the old system—accepting contributions from wealthy special interests—would be faced with various disincentives to raise more money than a Clean Elections opponent." JA 96.

In contrast to the proponents' preoccupation with limiting spending and leveling the playing field, their concern with corruption was, at best, tertiary and, at worst, an afterthought. Indeed, the Ninth Circuit recognized that "[t]here is no evidence that the Act was intended solely to remedy Arizona's apparent susceptibility to political corruption." App. 8.[7]

[7] The Ninth Circuit did note that there was "ample evidence" that voters were aware of, and concerned about, "continuing and repeated political corruption in Arizona." App. 8. The Ninth Circuit considerably overstated the influence of state campaign contributions on the four examples of "corruption" it listed, while ignoring the fact that state campaign finance laws could have done almost nothing to stop or cure these instances. App. 6-7. First, the conviction of Governor Fife Symington was for making false statements to financial institutions in his business transactions before he was governor. His conviction was overturned on appeal; *see United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), and he was then pardoned by President Clinton prior to any retrial. The Ninth Circuit's description of this episode below contained numerous errors and the court subsequently amended its decision to correct some of its errors. The court did not, however, change its discussion regarding the "concern" about corruption ostensibly generated by Governor Symington's experiences. *Compare* App. 7-8 n.1 *with McComish v. Bennett*, 605 F.3d 720, 724 n.1 (9th Cir. 2010). Second, Governor Evan Mecham was impeached for the misuse of government

(Continued on following page)

Moreover, the campaign to pass the Act equated "corruption" with the existence of private money in the campaign system in general, which proponents blamed for their failure to achieve their desired policy goals. Arguments for the Act in the ballot proposition guide stated that "important issues regarding health care, children and the environment are affected by political contributions," JA 226, and extolled the Act's ability to "end the money chase, halt corruption, limit campaign spending and reduce special interest influence." JA 227. Further, the public was promised that "limiting campaign spending and increasing disclosure requirements . . . will level the playing field so that the voices of Arizona's working families and seniors on fixed incomes are heard just as loudly as the big money donors who are corrupting our system." JA 228-29.

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funds, not campaign finance issues. Although he was indicted on charges relating to the failure to disclose a campaign loan, he was acquitted of all charges. *See Meehan, Acquitted of Concealing Loan*, N.Y. Times, June 17, 1988, at A14. The third scandal, involving Charles Keating and the U.S. Senators from Arizona, concerned federal elections and could not have been affected by an Arizona state campaign finance law. The fourth scandal discussed by the Ninth Circuit occurred twenty years ago and involved campaign contributions as a minor part of a much wider sting involving direct payments of bribes to legislators for their personal use in return for their votes. App. 7. Thus, to the extent that Arizona has, or has had, problems with political corruption, they have not arisen from campaign contributions for state elections.

C. How the Matching Funds Provision Has Burdened the Speech of Petitioners and Others

1. The Identity of the Petitioners

The independent expenditure group petitioners in No. 10-238 are two political action committees. The Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is an independent expenditure group that funds and makes independent expenditures in Arizona state campaigns. JA 777, 782. The Arizona Taxpayers Action Committee ("Arizona Taxpayers") is a small independent expenditure group that makes independent expenditures in Arizona state campaigns. App. 158-59.

The candidate petitioners in No. 10-238 are State Senator Rick Murphy and former State Treasurer Dean Martin. Senator Murphy was elected to the Arizona State Senate in 2010, having previously served as a State Representative. App. 166-67. He successfully ran for State Representative as a privately financed candidate against publicly financed candidates in 2006 and 2008 and as a publicly financed candidate in 2004. JA 401-02. Martin ran and was elected to the Arizona State Senate in 2000 as a privately financed candidate. JA 336. In 2006, he ran and was elected State Treasurer as a privately financed candidate against a publicly financed candidate. JA 337. In 2010, despite opposing the Act ideologically and politically, Martin ran as a publicly financed candidate in the Republican gubernatorial primary. FCF 432-1 at 2-4. He withdrew before the

primary election occurred. He ran as a publicly financed candidate in 2010, even in light of his opposition to the Act, because he believed this was the only strategy that would preclude his opponents from receiving significant government subsidies based on his exercise of his free speech rights. App. 153; ECF 432-1 at 2-4.[7]

2. The Effect on Petitioners

The Matching Funds Provision has reduced the spending and altered the timing of the speech of independent expenditure groups and privately financed candidates. Specifically, Arizona Taxpayers chose not to speak in opposition to a publicly financed candidate to avoid triggering matching funds to that candidate. JA 582-83. Similarly, Murphy chose not to fundraise—and therefore had less money with which to speak—in his 2006 and 2008 general election campaigns to avoid triggering matching funds to his publicly financed opponent(s). JA 567-68. Martin also avoided fundraising to prevent triggering matching

[7] Although Martin does not currently hold elective office, he has long been politically active in Arizona and expects to run for state office again in the future. App. 151-53. The year 2011 marks his seventh year of litigating against the Matching Funds Provision. His claims could not be resolved before any of his previous campaigns for office had concluded. His case is therefore "capable of repetition, yet evading review." *Davis v. FEC*, 554 U.S. 724, 735-36 (2008).

[8] Robert Burns, a plaintiff intervenor below, was an Arizona State Senator. Senator Burns retired in 2010.

funds during his 2006 campaign. JA 728-29. John McComish, Nancy McLain, and Tony Bouie, petitioners in No. 10-239, have similarly refrained from raising and spending money in support of their campaigns. *See* Petitioners McComish, *et al.*, petition for writ of certiorari at 9-10.

People who regularly contribute to campaigns in Arizona take the Matching Funds Provision into account and prefer to give to privately financed candidates and independent expenditure groups who will not trigger matching funds to publicly funded candidates the donors oppose. JA 395-96, 407; App. 160-61. And because matching funds are triggered by independent expenditures, candidates further restrict their own fundraising for fear that an unexpected independent expenditure may trigger additional matching funds to their participating opponents. In effect, privately financed candidates create a "cushion" in their own fundraising to avoid having an independent expenditure trigger matching funds to their opponent. JA 567. Martin has thus actively discouraged groups from making independent expenditures on his behalf in order to avoid triggering matching funds to his opponents. JA 577-78.

3. The Matching Funds Provision's Effect on Speech in Arizona

The Matching Funds Provision forces the following choice on every privately financed candidate and independent expenditure group opposed to a government funded candidate: speak and become the

mechanism of dissemination of speech the candidate or the group opposes, or remain silent. This choice alters a privately financed candidate's strategy from the outset of an election. As one Arizona political consultant explained, "every spending decision" is made with matching funds in view. JA 596. He explained that privately financed candidates are "always aware of the cost of spending that first incremental dollar" that triggers matching funds and results in, for example, mailing information to fewer voters and doing so less frequently. *Id.*

This forced choice also alters the timing of speech because candidates delay political activity until matching funds can be of little use to opponents—that is, they speak more towards the end of the campaign so that matching funds arrive too late to be used by the publicly financed candidate. Petitioners' expert witness, Dr. David Primo of the Political Science Department of the University of Rochester, confirmed the experience of participating candidates delaying speech, finding that the Matching Funds Provision alters the timing of speech especially in competitive races where matching funds matter most. JA 791-92, 922. Based on a regression analysis, Dr. Primo found that in races where matching funds are triggered, candidates change the timing of their fundraising activities and their expenditures. JA 791-92. In Arizona, fundraising and campaign spending on political speech by privately financed candidates tends to occur during the very end of the campaign and, in the general election, even after the campaign so that matching funds cannot affect the outcome. *Id.*

This pattern of delayed spending and delayed speech is consistent with the findings of researcher Michael Miller, who reported that "*every informant [he] interviewed*," which included both privately financed and publicly financed candidates, affirmed the delay in speaking by privately financed candidates in an effort to minimize the burdens of matching funds. JA 366. This pattern appears uniquely attributable to the Act, in that Respondent CEI's expert witness, Prof. Donald Green, had not seen it in any other election. JA 771-72.

Independent expenditure groups and candidates thus delay speech that may trigger the Matching Funds Provision until the end of election cycles in order to minimize the possibility that their political activity will result in fundraising advantages for their political opponents. Accordingly, the Freedom Club PAC and Arizona Taxpayers delay making independent expenditures until late in the election cycle to minimize the effect of Matching Funds. App. 159-60, 163-64. Martin, McComish, McLain, and Bouie also delayed their speech and fundraising until late in elections for the same reason. App. 153; *see* Petitioners John McComish, *et al.*, petition for a writ of certiorari.

Even when privately financed candidates stop speaking or modify their speech to avoid matching funds, the Matching Funds Provision still penalizes their decision to reject government financing by matching independent expenditures made to support their candidacy or to oppose their publicly financed

opponents. In his 2008 primary election for the House of Representatives, Murphy did not send out any mail pieces in order to conserve his resources for the general election—where he accurately anticipated being massively outspent by his three government-financed opponents. JA 567. Although Murphy did not fundraise during the 2008 general election—because doing so would have triggered almost $3 in matching funds for every $1 he raised—he could not prevent groups from spending money to support him. *Id.* Accordingly, when a group made an independent expenditure of $3,627 to support his candidacy, each of his publicly funded opponents received a check for nearly the same amount. As a result, the independent group's small expenditure triggered more than $10,000 used to oppose Murphy's election. JA 568-69.

The burdens inherent in the Matching Funds Provision have been clear since 2002, when Matt Salmon ran as a privately financed Republican candidate for governor. The Democratic Party spent $1 million on independent expenditures against Salmon. JA 287. Those expenditures did not count toward the publicly financed Democratic candidate's spending limit and did not trigger matching funds to Salmon. In contrast, when the Republican Party spent $330,000 in responsive independent expenditures, the government gave each of Salmon's publicly funded opponents $330,000 in matching funds. JA 287-88. Salmon also held a fundraiser with President Bush that raised $750,000. JA 289. After expenses, including meals and costs for Air Force One, his campaign

netted only $500,000. *Id.* Nonetheless, the Matching Funds Provision triggered $750,000 to each of his two opponents. *Id.* A spokesperson for the Democratic campaign stated, "I'm not sure the president realizes he's raising money for both candidates," and referred to the event as a "dual fund-raiser." JA 284. Consequently, Club for Growth director Steve Moore told Salmon during the campaign that because of matching funds, the Club would not spend any money supporting his candidacy. JA 290.

In the case of Salmon's fundraiser with President Bush, the Legislature had not yet added the 6% reduction for fundraising expenses, so each of Salmon's government-funded opponents received the full amount spent or raised above the trigger level. However, even if the 6% reduction was in place during Salmon's race, his fundraising costs for the fundraiser were *five-and-a-half times* the statutory reduction amount.

The Matching Funds Provision has chilled speech across the political spectrum. In 2004, Mainstream Arizona, a group that promotes moderate Republicans, sent out preprimary mailings praising certain legislators for their support of a bipartisan budget. JA 300-01; ECF 288-7 at 26. Although the mailings did not directly urge recipients to vote for or against candidates, and even though Mainstream Arizona tried to avoid triggering matching funds, the Commission found that the $40,000 mailings required the government to distribute $67,500 in total matching funds to fifteen candidates. JA 300-01; ECF 288-8 at 26. Not only did Mainstream Arizona inadvertently

trigger matching funds when it spoke about issues it was founded to advance, the issuance of matching funds chilled Mainstream Arizona's involvement in the campaign. JA 301.

On the Democratic side, when a Republican candidate, David Stevens, violated the Act's rules, he became ineligible for matching funds. JA 548-49, 557-58. Political committees affiliated with the Democratic Party, Victory 2008 and Arizonans for a Healthy Economy, decided to make independent expenditures against him. As both groups later affirmed, "[h]ad Mr. Stevens been eligible for matching funds," those groups "would not have made independent expenditures" in his district. JA 549, 558. Nevertheless, the Citizens Clean Elections Commission subsequently awarded matching funds to Stevens despite his violation of the rules. JA 555.

The numerous individual and independent choices to avoid or minimize matching funds have resulted in a reduced amount of political speech in the aggregate. This is exactly as the Act's proponents intended. Respondent CEI's expert witness, Donald Green, testified that while overall electoral spending has increased in Arizona, it has not increased as much as it would have had the Act not been in effect. JA 768. Prof. Green conceded that the Act violates the First Amendment by limiting speech, and that the only real question is "how bad[ly]" it violates the constitution. JA 773. Similarly, Dr. Primo testified that while many states have seen a surge in campaign spending since 1998, Arizona is not one such state. JA 922.

Indeed, as Dr. Primo testified, the actual increase in spending in absolute terms in Arizona has been modest. *Id.*

D. The Procedural History of the Case

On January 29, 2004, Martin, as a plaintiff in *Association of American Physicians & Surgeons v. Brewer*, No. 04-cv-0200-EHC, first challenged the constitutionality of the Act's Matching Funds Provision in the United States District Court for the District of Arizona. That action was dismissed for failure to state a claim by the district court at 363 F. Supp. 2d 1197 (D. Ariz. 2005). On appeal, the Ninth Circuit first dismissed the appeal as moot, 486 F.3d 586 (9th Cir. 2007), but upon reconsideration found that Martin's appeal was not moot and that he had stated a cause of action. It then remanded to the district court. 494 F.3d 1145, 1146, *amended by* 497 F.3d 1056 (9th Cir. 2007). Once back in the district court under the recaptioned *Martin v. Brewer*, Martin was joined in his challenge by Arizona Taxpayers and the Freedom Club PAC.

On August 21, 2008, privately financed candidates John McComish, Nancy McClain, and Tony Bouie, Petitioners in No. 10-239, filed a separate challenge to the constitutionality of the Matching Funds Provision in the United States District Court for the District of Arizona in *McComish v. Brewer*, No. 08-cv-1550-ROS. Upon motion of the State of Arizona, the district court in the *Martin* action refused to

consolidate the two actions. As a result, the plaintiffs in the *Martin* action, now joined by Murphy, intervened in the *McComish* action and voluntarily dismissed the *Martin* action.

On August 29, 2008, the district court found that the Matching Funds Provision likely violated the First Amendment, but refused to enter a temporary restraining order. App. 119-31. On October 17, 2008, the district court again found that the Matching Funds Provision likely violated the First Amendment, but refused to enter a preliminary injunction. App. 90-118. Finally, on January 20, 2010, the district court granted summary judgment to all challengers to the Matching Funds Provision and entered a permanent injunction against its enforcement. App. 45-78. The district court stayed the effect of the injunction for ten days to permit defendants and defendant-intervenors (Respondents in this proceeding) time to appeal, which they did. App. 77.

The *McComish* plaintiffs then moved the Ninth Circuit to vacate the stay. On January 29, 2010, the Ninth Circuit refused to vacate the stay of the injunction and consolidated both state defendants' and defendant-intervenor's appeals. App. 87-88. Judge Carlos Bea dissented from the court's refusal to vacate the stay. App. 89. On February 1, 2010, the Ninth Circuit extended the stay of the injunction and expedited the appeals. App. 80-81. Judge Bea again dissented. App. 81.

On May 21, 2010, the Ninth Circuit merits panel, consisting of Judges Tashima, Thomas, and Klemfeld, reversed and remanded in a decision published at 605 F.3d 720 (9th Cir. 2010). On June 23, 2010, the Ninth Circuit amended its prior decision. 611 F.3d 540 (9th Cir. 2010). The amended decision was not published and appears at App. 1-44.

On June 8, 2010, this Court stayed the Ninth Circuit's decision and ordered the district court's permanent injunction to take effect. App. 79.

The petitions for certiorari in both *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, No. 10-238, and *McComish v. Bennett*, No. 10-239, were filed on August 17, 2010. This Court granted both petitions and consolidated the cases on November 29, 2010.

SUMMARY OF ARGUMENT

The central question in this case is whether the government may coerce Arizona state independent expenditure committees and privately financed candidates into limiting their speech during political campaigns. Its resolution will determine whether the government may, in order to promote a system of publicly financed campaigns, burden the speech of those who do not, or cannot, use public money to fund their political speech. It will decide whether the government may "level the playing field" among political actors by creating various disincentives for speakers

to fully and unreservedly exercise their First Amendment rights. In a deeply flawed decision, the Ninth Circuit determined that Arizona may do all these things and thereby create *de facto* limits on expenditures. This conclusion was contrary to this Court's First Amendment jurisprudence and should be reversed.

I. In *Davis v. FEC*, 554 U.S. 724 (2008), this Court struck down Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (known as the "Millionaire's Amendment"). The Court held that the Millionaire's Amendment created a "special and potentially significant burden" on expenditures by a self-financed candidate because it granted that candidate's opponent fundraising advantages based on the self-financing candidate's decision to spend above a certain amount in promoting his campaign. It rejected the government's argument that these fundraising benefits were justified by the need to make the contest between self-financed and non-self-financed candidates more equitable and concluded that this justification was not a legitimate reason to regulate campaign finances.

The Matching Funds Provision does exactly what this Court said the government could not do in *Davis* and more. Instead of imposing different fundraising limits on candidates in the same race, the Matching Funds Provision provides direct subsidies to candidates who participate in Arizona's public financing system. These subsidies are triggered when non-participating candidates and independent

expenditure groups supporting them choose to speak above a certain amount. The Matching Funds Provision thus imposes the same choice on independent expenditure groups and privately financed candidates in Arizona as the Millionaire's Amendment imposed on the plaintiff in *Davis*: it requires a candidate or independent expenditure group "to choose between the First Amendment right to engage in unfettered political speech and subjection" to discriminatory funding mechanisms. *Davis*, 554 U.S. at 739. This choice constitutes a burden on the ability of independent expenditure groups and privately financed candidates to spend freely in support of their political goals. It violates their right to be free from government regulations that burden their speech in order to enhance the relative voice of their political opponents. It constitutes a *de facto* limit on political expenditures contrary to this Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010). The Act, through the Matching Funds Provision, does this in order to limit spending and "level the playing field" among political actors in Arizona. The Matching Funds Provision thereby replicates and amplifies the constitutional deficiencies of the Millionaire's Amendment and is similarly unconstitutional.

2. The Ninth Circuit nonetheless viewed the Act as a public financing system that furthers anti-corruption efforts by providing funding alternatives to candidates similar to the system for Presidential elections this Court upheld in *Buckley*. The Act is fundamentally different from the system upheld in

Buckley, however. Unlike the system at issue in *Buckley*, the Act is designed not to promote speech, but to restrict campaign spending by speakers who do not participate in the system. This Court's conclusion in *Buckley* that government financing of campaigns can be constitutional in principle has no application to the Act, which uses unconstitutional means in the Matching Funds Provision.

3. The Matching Funds Provision severely burdens speech both as a matter of law and as a matter of fact. Because it burdens fully protected speech, the Matching Funds Provision is subject to strict scrutiny and can survive only if it is narrowly tailored to support a compelling governmental interest. The Matching Funds Provision does not meet this standard. The Matching Funds Provision is not narrowly tailored because it burdens the speech of independent expenditure groups and self-financed candidates in order to achieve an ostensible anti-corruption purpose. These two types of speakers do not cause corruption in the political process, however, and their speech cannot be burdened in order to fight corruption. The Matching Funds Provision is also not narrowly tailored because it is not itself directed at fighting corruption or its appearance. Instead, the Matching Funds Provision exists to "level" the speech of privately financed candidates and independent expenditure groups who speak against publicly financed candidates. It does so by creating disincentives for candidates and independent expenditure groups to

engage in political activity above the expenditure limit set by the Act. The Matching Funds Provision's effect on corruption is thus far too attenuated and indirect to survive strict scrutiny. And because the Matching Funds Provision's foremost purpose is to "level the playing field" by deterring speech by independent expenditure groups and privately financed candidates, and not prevent corruption, the Matching Funds Provision is not supported by a compelling governmental interest. Even if it were supported by a governmental interest in preventing corruption, moreover, that interest cannot justify restrictions on expenditures.

ARGUMENT

I. THE MATCHING FUNDS PROVISION BURDENS FREE SPEECH BY FORCING INDEPENDENT EXPENDITURE GROUPS AND PRIVATELY FINANCED CANDIDATES TO CHOOSE BETWEEN MAKING UNFETTERED POLITICAL EXPENDITURES AND PROVIDING FUNDRAISING ADVANTAGES TO THEIR POLITICAL OPPONENTS.

With one recently overturned exception, since *Buckley*, this Court has consistently held that the government may not limit expenditures by independent groups and privately financed candidates. But *Buckley* dealt with an explicit restriction on expenditures, while the Act contains no overt restriction on

the amount of speech in which independent expenditure groups and privately financed candidates may engage. For the Ninth Circuit, this distinction was determinative because it meant that the Act "does not actually prevent anyone from speaking." App. 33. For the First Amendment, though, this distinction is meaningless.

This Court has consistently held that laws that create disincentives to speak may violate the First Amendment as well as any direct command. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). In other words, the First Amendment focuses on outcomes rather than forms: "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 130 S. Ct. at 898. The question here is not whether the government explicitly bans speech, but whether the Matching Funds Provision penalizes speech by forcing independent expenditure groups and privately financed candidates to choose between unfettered political expression and funding advantages for their political rivals. The answer to that question is "yes," and, under *Davis*, this penalty constitutes a substantial burden on free speech.

A. Under *Davis*, Laws That Provide Funding Advantages To a Speaker's Political Opponents in Competitive Elections Substantially Burden Protected Speech.

In *Davis*, the Court struck down the Millionaire's Amendment, which allowed opponents of self-financed candidates in federal elections to accept funds in the amount of three times the maximum contribution limit from individuals if their self-financed opponents spent more than a certain amount of their own funds. The Court concluded that this system "impermissibly burden[ed] [the self-financing candidate's] First Amendment right to spend his own money for campaign speech." *Davis*, 554 U.S. at 738. The law created an "unprecedented penalty" on any self-financing candidate who robustly exercised her First Amendment rights: if she engages in "unfettered political speech," she will be subject "to discriminatory fundraising limitations." *Id.* at 739. Self-financing candidates could still spend their own money, "but they must shoulder a special and potentially significant burden if they make that choice." *Id.*

This Court recognized that laws that force a speaker to be the unwilling vehicle by which his message is countered create "a special and potentially significant burden . . . ." *Id.* (citing *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994)). It thus concluded that the Millionaire's Amendment burdened the "fundamental nature of the right to spend personal funds for campaign speech" because it "'impose[d]

some consequences'" on a candidate's choice to self-finance beyond certain amounts. *Davis*, 554 U.S. at 738-39 (quoting FEC brief).

The Matching Funds Provision imposes the same consequences as the Millionaire's Amendment and more. By forcing independent expenditure groups and privately financed candidates to choose between triggering enhanced funding to their opponents and spending money in support of their political cause, the Matching Funds Provision similarly penalizes the exercise of First Amendment rights. It gives independent expenditure groups and privately financed candidates two poor alternatives. Those who continue to speak shoulder the burden of enabling funding that promotes their political rivals in the zero-sum context of electoral politics. Those who remain silent are prevented from speaking. Under *Davis*, the Act severely burdens the right of independent expenditure groups and privately financed candidates to spend money for campaign speech.

It is no surprise, then, that the Second and Eleventh Circuits have held that systems similar to the Matching Funds Provision are unconstitutional under *Davis*. *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010).[*] The Ninth Circuit alone has rejected

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[*] In his dissent from the panel decision extending the stay of the district court's injunction in this case, Judge Bea also concluded that "this case is determined by *Davis* . . . because state intervention in the funding of campaign contributions in a

(Continued on following page)

the argument that *Davis* determines the constitutionality of such systems. App. 24. The Ninth Circuit instead concluded that *Davis* did not apply because this Court had described the Millionaire's Amendment as asymmetrical and discriminatory and therefore "the law constituted a burden on Davis' speech *only* because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign . . . ." App. 25 (emphasis added).

The Ninth Circuit badly misinterpreted *Davis*. What triggered strict scrutiny there was the grant of a competitive advantage that resulted from Davis's constitutionally-protected decision to spend his personal funds. Indeed, matching funds are actually more burdensome than the Millionaire's Amendment because they relieve participants from the burden of raising funds entirely. *See Green Party*, 616 F.3d at 245 ("The penalty imposed by the excess expenditure provision . . . is *harsher* than the penalty in *Davis*, as it leaves no doubt that . . . the opponent of the self-financed candidate [] will receive additional money."). Under the Millionaire's Amendment, the non-self-financing candidate still had to raise funds from private parties. In contrast, once a group or

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manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his own money." App. 81.

candidate triggers the Matching Funds Provision, the government directly gives extra financing to all publicly financed candidates in a race.

Davis's core holding was that a law that forced a speaker to choose between spending unlimited private funds on speech and enabling fundraising advantages to her opponent was an unconstitutional burden on free speech. In *Davis*, those fundraising advantages came in the form of higher contribution limits. Here, they come in the form of direct government subsidies to participating candidates. Whatever the nature of the fundraising advantage, though, it was the government's imposition of a choice between two bad alternatives that this Court held was an unconstitutional burden on speech. The Ninth Circuit disregarded this holding when it concluded that *Davis* applies only to asymmetrical contribution limits. The Ninth Circuit's decision therefore conflicts with *Davis* and should be reversed.

B. The Matching Funds Provision Violates Petitioners' Right To Be Free From Government Restrictions That Abridge Their Political Speech in Order To Enhance the Relative Voice of Their Political Opponents.

The First Amendment protects Petitioners' "right to be free from government restrictions that abridge [their] own rights in order to 'enhance the relative voice' of [their] opponents." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986) (quoting

Buckley, 424 U.S. at 49). This right is well-established and flows from the common-sense conclusion that the government chills speech when it creates a system under which the act of speaking gives the speaker's opponent the means to counter that speech.

This Court has long recognized this principle. For example, in *Pacific Gas & Electric Co.*, California ordered a utility to make its billing envelope available to a consumer group. In rejecting this order, a plurality of this Court reasoned: "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pac. Gas & Elec. Co.*, 475 U.S. at 9. The plurality stated that "whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views. Appellant might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Id.* at 14 (internal quotation marks and citation omitted).

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court struck down a Florida law that granted candidates equal space to reply to criticism by a newspaper. The government claimed this regulation was necessary to ensure a variety of viewpoints reached the public and maintained the law did not prevent the newspaper from publishing what it wished. *Id.* at 247-48, 256. The

Court nonetheless concluded that the statute chilled expression about candidates and thus diminished free and robust debate. *Id.* at 257.*

The Ninth Circuit overlooked the fact that the First Amendment protects the right of Americans to engage in unfettered, free, uninhibited, robust, and wide-open political activity. *Buckley*, 424 U.S. at 14. Laws that interfere with the speaker's discretion to determine when, under what circumstances, and how much to speak interfere with this right.

For instance, although the Ninth Circuit termed Petitioners' decision to delay speaking until late in the election cycle as merely a "strategic choice," App. 31, the choice of when to speak is the speaker's alone to make under the First Amendment. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (rejecting a law that prohibited a newspaper from printing an editorial on election day urging voters to vote a certain way even though the newspapers could print whatever they wanted the day before or the day after the election). "The First Amendment protects [a group's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

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* This Court has rejected the argument that *Pacific Gas & Electric Co.* and *Miami Herald* stand solely for the proposition that laws that require the speaker to devote her property to the dissemination of her opponent's message are unconstitutional. Rather, those were independent grounds for invalidating those restrictions. *See Pac. Gas & Elec. Co.*, 475 U.S. at 12 n.7.

It is not a "strategy" to delay speaking in order to avoid government subsidies to one's opponent; it is a restriction on the speaker's message caused by government policy and a violation of the First Amendment. The Matching Funds Provision thereby burdens speech as much as the statutes this Court struck down in *Pacific Gas & Electric Co.*, *Miami Herald*, and *Mills*. "In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Under our Constitution, the First Amendment mandates that this Court presume that speakers, and not the government, know best both what to say and how to say it. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). The Matching Funds Provision destroys the speaker's right to engage in unfettered and uninhibited political debate by burdening her speech in order to advance the relative voice of publicly financed candidates through matching funds.

II. BECAUSE IT WAS DESIGNED TO BURDEN SPEECH, THE MATCHING FUNDS PROVISION FUNDAMENTALLY DIFFERS FROM THE PUBLIC FINANCING SYSTEM UPHELD IN *BUCKLEY*.

Despite the obvious parallels between the Millionaire's Amendment and the Matching Funds

Provision, the Ninth Circuit instead relied on the portion of *Buckley* that upheld a public financing system for presidential elections. App. 35. In essence, the Ninth Circuit held that because *Buckley* concluded that public financing promotes legitimate goals in principle, a system that penalizes nonparticipation in order to promote a public financing system is constitutional in practice. App. 36-37. To reach this conclusion, the Ninth Circuit disregarded both the structure of the Act and the nature of the system at issue in *Buckley*.

The Matching Funds Provision bears no similarity to the public financing system upheld in *Buckley*. The Matching Funds Provision was expressly designed to limit overall campaign spending and to achieve equality among speakers by penalizing those who choose to exercise their right to spend unlimited private funds on speech. In contrast, the system in *Buckley* was designed to provide an alternative to candidates who wished to lessen their reliance on private funds and, in upholding that system, the Court did not conclude that the government could pursue public financing by any means necessary. *Buckley*'s approval of public financing therefore does not control in this case.

A. The Matching Funds Provision Was Designed To Limit and Equalize Spending in Political Campaigns.

The Act was conceived, structured, promoted, and passed principally to limit campaign spending and reduce the influence of political actors with whom the proponents of the system disagreed. The Act has consistently been promoted to Arizona voters as a means to "level the playing field" among political actors. *See* JA 226-30.[7] Indeed, the Matching Funds Provision itself is entitled "Equal Funding of Candidates."

The Act achieves these goals by creating a system in which the government disburses burdens—or "disincentives"—to privately financed candidates and the independent groups that support them in campaigns. JA 96, 110. These disincentives include:

- providing matching funds to publicly financed candidates based on the speech of their privately financed opponents.

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[7] When Arizona courts interpret statutes adopted by initiative, "the primary objective . . . is to give effect to the intent of the electorate." *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 212 P.3d 805, 808 (Ariz. 2009) (quoting *State v. Gomez*, 127 P.3d 873, 875 (Ariz. 2006)). To discern voter intent, courts most often look to the publicity pamphlet. *See Gomez*, 127 P.3d at 877; *Jett v. City of Tucson*, 882 P.2d 426, 431 (Ariz. 1994); *Estes v. Arnold*, 685 P.2d 111, 113 (Ariz. 1984). Generally, courts have cited the "descriptive title" and "arguments for" in the publicity pamphlet. *Estes*, 685 P.2d at 113; *Jett*, 882 P.2d at 431. As described above, the publicity pamphlet is replete with references to "limiting spending" and "leveling the playing field." JA 226-30.

- providing matching funds to publicly funded candidates based on independent expenditures by groups that privately financed candidates do not control and with whom they cannot coordinate;

- providing matching funds to publicly financed candidates running against a privately financed candidate based on the independent expenditures of groups that do not promote, or even mention, the privately financed candidate at all, but merely oppose the publicly financed candidate;

- providing matching funds to every publicly financed candidate in a race, thereby multiplying the funding advantages of all publicly financed candidates in a race; and

- deducting only 6% for fundraising costs from the matching fund grant when actual fundraising costs can be substantially higher.

The burdens on independent expenditure groups supporting privately financed candidates are especially egregious and unfair. Assuming the trigger level has been met, in a race between one publicly financed candidate and a privately financed candidate, an independent expenditure group spending in support of the publicly financed candidate can spend as much as it likes with no government-imposed consequences. In contrast, if an independent expenditure group opposes the publicly financed candidate—

or, in the case of Mainstream Arizona, just promotes the issues the group was founded to advance—that spending will result in more funding to support a candidacy the group rejects. In other words, there is no way for an independent expenditure group opposing the publicly financed candidate to participate in the election without generating government subsidies that undermine its interests.

In sum, the Act's structure creates inherent disincentives for speech funded by private parties. By operation of the Matching Funds Provision, the Act does far more than simply provide funding resources to candidates who wish to minimize or eliminate their reliance on private funds, as did the public financing system at issue in *Buckley*. Instead, the Act inserts the government directly into Arizona elections and firmly places its thumb on the scale in favor of publicly financed candidates.

B. The Public Financing System in *Buckley* Was Not Designed To Limit Spending or "Level the Playing Field" Among Candidates and It Did Not Penalize Nonparticipating Candidates or Independent Expenditure Groups for Exercising Their First Amendment Rights.

These disincentives distinguish the Act from the public financing system at issue in *Buckley*. In that case, the Court considered Subtitle H of the Internal Revenue Code, which provided for the public financing of Presidential campaigns. Under Subtitle H,

taxpayers authorized the government to pay funds from their tax liability to candidates and parties for certain election-related expenses. The system provided funds to candidates who pledged not to spend above a certain amount and to restrict their private fundraising. In upholding this system against a First Amendment challenge, the Court held that "Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 92-93.

Buckley thus holds that a truly voluntary system of public financing can enhance First Amendment values as a general proposition. But the system approved in *Buckley* is distinguishable from the Act in that the Act creates disincentives to spend too much money outside of the system. In particular, in upholding the Presidential system, this Court stressed that Subtitle H was not intended to burden speech. *Id.* at 92-93. The opposite is true of the Act. The Matching Funds Provision was designed to limit spending in campaigns and neutralize certain speakers in Arizona politics. It uses public money not as a means to facilitate speech, but as a means to manipulate speech in contests between publicly financed candidates and their privately financed opponents and their supporters.

In that regard, the size of the government's grant to a participating candidate in Subtitle H was completely divorced from the political activities of his opponents or independent political groups. Under Subtitle H, it did not matter what a participating candidate's opponents or their political supporters did—the government-granted subsidies were the same size and were triggered without reference to anyone else's speech. In contrast, the Matching Funds Provision directly ties the government grant of fundraising advantages to the political activity of the participating candidate's opponents and their supporters. The Matching Funds Provision's harm to independent expenditure groups and privately financed candidates places it outside of the rule in *Buckley*.

The Ninth Circuit erred when it concluded that, because *Buckley* upheld public financing in general, Arizona could burden speech in order to promote public financing. this Court has never accepted the proposition that if some regulation is constitutional, more regulation must be better. "'[The] power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (quoting *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940)). Consider, for instance, this Court's treatment of contribution limits. In *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld federal contribution limits to candidates against constitutional challenge, reasoning that they were a legitimate means to battle

corruption or its appearance. *See Buckley*, 424 U.S. at 28; *McConnell*, 540 U.S. at 136-37. Subsequently, in *Randall v. Sorrell*, 548 U.S. 230 (2006), this Court examined Vermont's contribution limits. The challengers there argued that Vermont's limits were so low that they interfered with their ability to amass the resources necessary for effective campaigns. *Randall*, 548 U.S. at 248. Under the reasoning of the Ninth Circuit below, if contribution limits are a constitutional means to battle corruption, even the most severe steps to further that interest would also be constitutional. This Court rejected that premise, though, noting that "that rationale does not simply mean 'the lower the limit, the better.' That is because contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 248-49.

Similar concerns should guide the Court here. While this Court has concluded that public financing may further a significant governmental interest, that interest must be weighed against any harm to free speech and the electoral process created by the particular public financing system before it. In particular, the Court must use its "independent judicial judgment," *id.* at 249, to assess the proportionality of the restrictions with any purported benefits. Restrictions on expenditures by groups or individuals "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth

of their exploration, and the size of the audience reached," and thus "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 19, 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Thus, although this Court has recognized certain benefits from public financing, it does not follow that the government may create a public financing system that undermines speech and political activity integral to the operation of our system of government. The Ninth Circuit read *Buckley*'s holding with respect to public financing systems far more broadly than that decision warrants. App. 25-26.

III. THE MATCHING FUNDS PROVISION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT SEVERELY BURDENS POLITICAL SPEECH AND IS CONTENT-BASED.

The Matching Funds Provision is designed to burden political speech and does so in fact. The Matching Funds Provision is therefore subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).[11]

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[11] The Ninth Circuit concluded that because the Matching Funds Provision and disclosure provisions both do not explicitly restrict speech, the Matching Funds Provision should be subject to intermediate scrutiny just like disclosure provisions. This argument is easily dispensed with. As noted by *amicus curiae* Cato Institute in support of the petition for certiorari, "[t]his

(Continued on following page)

The Ninth Circuit upheld the Matching Funds Provision in large part because it concluded that Petitioners had shown no cognizable harm. App. 27. In fact, the record is filled with examples of harm. Martin and Murphy both intentionally delayed and limited their fundraising in order to minimize matching funds. Martin actively discouraged independent political groups from making expenditures that would trigger matching funds. Murphy did not fundraise in the 2008 general election because he faced three publicly funded opponents and would have triggered almost $3 in matching funds for every $1 he raised beyond the general election trigger amount. The independent expenditure committees have been harmed by triggering matching funds to the candidates they oppose based solely on the exercise of their free speech rights and have altered the timing of their speech, often delaying it until later in the election cycle to minimize the harmful effects of the Matching

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Court has never suggested that [limits on expenditures] are comparable to disclosure requirements and therefore subject only to intermediate scrutiny." Cato Br. at 8. Moreover, this Court had an opportunity in *Davis* to apply disclosure-style scrutiny to a law that did not explicitly burden expenditures but nonetheless applied strict scrutiny. *Davis*, 554 U.S. at 740. Finally, disclosure requirements create a chill on an organization's contributors, not on the organizational speaker itself. *See Citizens United*, 130 S.Ct. at 914. This Court has always distinguished between laws that burden contributors and those that burden speakers. *See Buckley*, 424 U.S. at 20-21. Burdens that fall on the speaker are given strict scrutiny. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

Funds Provision. In the 2006 primary, Arizona Taxpayers declined to speak in opposition to a publicly financed Senate candidate because such speech would have triggered matching funds. Martin was coerced into running as a publicly financed candidate for governor in order to avoid the inequitable treatment of privately financed candidates under the Act. JA 153.

Despite this evidence, the Ninth Circuit determined that because Petitioners had refused to buckle under the Act's inequitable burdens in all instances, the government could continue to burden their speech. App. 27. Thus, under the Ninth Circuit's rationale, the amount of speech the government is allowed to suppress depends on how successful it has been in suppressing speech up to now.

But one need not actually stop speaking before the government violates the First Amendment. And whether a law has a chilling effect cannot depend on the fortitude of the individual plaintiffs who choose to challenge it. *Davis*, again, is instructive. In *Davis*, this Court recognized that the Millionaire's Amendment "impermissibly burden[ed]" First Amendment rights even though it did not outright prohibit speech. 554 U.S. at 738. The proof of this burden was not a question of fact to be established by a litigant; rather, the burdens were inherent in the statute. Indeed, even though Davis triggered the Millionaire's Amendment, his opponents never took advantage of the provision. Regardless, this Court still found the

Millionaire's Amendment unconstitutionally burdened Davis's speech. *Id.* at 734, 744.[11]

Moreover, under the Matching Funds Provision, the government only issues matching funds in response to speech with certain content. For instance, if an independent expenditure group produces a television advertisement against a privately financed candidate, the government does not issue matching funds. However, if that same group produces a television advertisement in support of the same privately financed candidate and the trigger level has been reached, the government issues matching funds to all publicly financed candidates in the race. Matching funds are thus activated by a particular message and are therefore "content-based." *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

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[11] The Court regularly strikes down laws that do not command silence but nonetheless violate the First Amendment. For instance, in *Thomas v. Collins*, 323 U.S. 516, 540 (1945), this Court held that a requirement that one register with the government before giving a public speech was incompatible with the First Amendment. In *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), this Court found a government program that labeled certain mail "communist political propaganda," and asked its addressees to confirm their desire to receive it before it would be delivered, violated the First Amendment rights of the addressees. Notwithstanding the fact that no addressee was denied delivery of the "propaganda," this Court recognized "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* at 307. And in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), a tax on paper and ink, which did not prohibit any speech but did specially burden it, was found unconstitutional.

Laws that permit the government to discriminate on the basis of the content of a message "cannot be tolerated under the First Amendment." *Simon & Schuster*, 502 U.S. at 116 (internal quotation marks omitted). These laws are subject to the "most exacting" and "rigorous" scrutiny. *Turner*, 512 U.S. at 642. Indeed, content-based laws are so incompatible with the First Amendment that this Court considers them to be presumptively invalid. *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010). The Matching Funds Provision cannot survive strict scrutiny, nor can the government rebut the presumption of the Matching Funds Provision's invalidity.

IV. THE MATCHING FUNDS PROVISION FAILS STRICT SCRUTINY BECAUSE IT IS NOT NARROWLY TAILORED AND DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST.

Under strict scrutiny, the government must prove that the Matching Funds Provision furthers a compelling governmental interest and that it is narrowly tailored to achieve that interest. *Wis. Right to Life, Inc.*, 551 U.S. at 464. The Matching Funds Provision fails this test.

A. The Matching Funds Provision Is Not Narrowly Tailored To Serve An Anti-Corruption Interest.

The government may only regulate the content of constitutionally protected speech in order to promote a compelling governmental interest.[7] In doing so, it must choose the least restrictive means to achieve that interest and must not unnecessarily interfere with First Amendment freedoms. *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Ninth Circuit found the government's interest here to be preventing corruption or the appearance of corruption caused by large private contributions. App. 33.

The Matching Funds Provision is not narrowly tailored to achieve this interest for at least four reasons: first, the provision burdens the speech of speakers who do not cause corruption; second, it discriminates against speakers who cannot choose to participate in the public financing system on the basis that they have chosen not to participate in the public financing system; third, its burdens do not directly further an anti-corruption interest; and, fourth, there are no large private contributions to cause corruption in Arizona elections.

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[7] In addressing narrow tailoring, Petitioners assume for the sake of argument that the government possesses a compelling governmental interest here.

1. The Matching Funds Provision Is Not Narrowly Tailored Because It Burdens Speech by Political Actors Whose Speech Does Not Give Rise To Corruption or the Appearance of Corruption.

The Ninth Circuit determined that the Matching Funds Provision could "level" the speech of independent expenditure groups and self-financed candidates because burdening their speech makes it more likely that candidates will take public money, thereby inoculating these candidates from the potentially corrupting influence of private contributions. App. 35. In other words, although the government cannot burden speech to "level the playing field" and it cannot directly burden independent expenditures or self-financed candidates, the Ninth Circuit held it can indirectly burden these speakers in order to level the playing field. This conclusion contradicts both *Citizens United* and *Davis*.

In *Davis*, this Court reaffirmed *Buckley*'s holding that the government may not cap a candidate's expenditure of personal funds to finance campaigns. *Davis*, 554 U.S. at 738–39. The Court specifically noted that a cap on personal expenditures imposes a substantial, clear, and direct restraint on the First Amendment right to engage in the discussion of public issues and vigorously advocate for one's own election. *Id.* at 738 (quoting *Buckley*, 424 U.S. at 52–53). The Court also noted that a restriction on a candidate's use of personal funds disserves any

anti-corruption purpose because it increases the candidate's dependence on outside contributors. *Davis*, 554 U.S. at 738.

As the district court found, the Matching Funds Provision imposes the same penalty on self-financed candidates in Arizona state elections as the Millionaire's Amendment did in federal elections. App. 68-69. Like the Millionaire's Amendment, the Matching Funds Provision actually undermines the government's anti-corruption purpose by burdening self-financing by candidates. The provision is not narrowly tailored for this reason alone.

But the Matching Funds Provision does not stop there. It imposes identical burdens on independent expenditure groups as well, which share many of the same attributes as self-financed candidates. As the Second Circuit recognized, "nothing in *Davis* suggests that the 'right to spend personal funds for campaign speech' is limited to *candidates only*." *Green Party*, 616 F.3d at 245 (quoting *Davis*, 554 U.S. at 738). Independent groups also have the "First Amendment right to engage in unfettered political speech" and, under the Matching Funds Provision, the vigorous exercise of the right to use their funds to finance campaign speech produces fundraising advantages for politicians they do not support. *Davis*, 554 U.S. at 739-40.

Like the speech of self-financed candidates, "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens*

United, 130 S. Ct. at 909. The Ninth Circuit's opinion thus assumes that the government may suppress the speech of third parties who do not implicate corruption concerns so long as the government can claim that doing so will prevent corruption. This is not narrow tailoring. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). By infringing on speech that does not pose the danger that prompted regulation, the Matching Funds Provision fails narrow tailoring.

2. The Matching Funds Provision Is Not Narrowly Tailored Because It Burdens the Speech of Independent Expenditure Groups That Cannot Participate In the Public Financing System.

The Ninth Circuit held that Arizona could treat candidates differently depending on whether they chose to take public funding. App. 25a ("[I]t is constitutional to subject candidates running against each other . . . to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system."). This conclusion demonstrates the lack of tailoring in the Act, however, because it ignores the effect of the Matching Funds Provision on independent expenditure groups.

Independent expenditure groups cannot qualify for public funding under the Act and cannot "voluntarily choose" to accept or reject public funds. Instead, independent expenditure groups have only two choices available to them: they can either remain silent or they can speak and have the government "level" their voices by directly providing funding advantages to candidates they oppose. Like the self-financed candidate in *Davis*, the Act does not provide any way an independent expenditure group can exercise the unfettered right to make unlimited expenditures without abridgment unless it foregoes advocacy on behalf of privately financed candidates or against publicly financed candidates. *Davis*, 554 U.S. at 740.

More significantly, however, this Court has already rejected the Ninth Circuit's "voluntary choice" argument in *Davis*. The Court there rejected the argument that *Buckley* permitted the government to create a drag on speech "as a consequence of a statutorily imposed choice" because the public financing system there imposed an expenditure limit on participating candidates. *Davis*, 554 U.S. at 739. The Court noted that "[i]n *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, [the Millionaire's Amendment] does not provide any way in which a candidate can exercise that right without abridgment." *Id.* at 739-40.

The impact on independent expenditure groups is even worse, because they are unable to participate in the public financing system. Their "choice" is to stop

speaking at some point or have the government pay direct subsidies to their political opponents. As in *Davis*, there is no way for them to exercise their rights without abridgment. The Act's lumping together of independent expenditure groups and privately financed candidates demonstrates the lack of careful tailoring in the law.

3. The Matching Funds Provision Is Not Narrowly Tailored Because It Does Not Directly Address Corruption.

The Matching Funds Provision is not narrowly tailored for another reason: it regulates and burdens the speech of independent expenditure groups and privately financed candidates in order to provide incentives for participating candidates to avoid corruption. The Ninth Circuit concluded that such an indirect means of fighting corruption was appropriate. However, it is not narrow tailoring. Narrow tailoring requires that, in pursuing its goal, the government's means are the "least restrictive of freedom of [political] belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

In the arena of free speech, the government is required to use "precision" of regulation as its "touchstone." *Id.* (internal quotation marks and citations omitted). To that end, this Court consistently rejects

government regulations that suppress fully protected speech in order to more efficiently regulate speech that may be constitutionally restricted. In *Wisconsin Right to Life*, the FEC argued that it could regulate constitutionally protected issue advocacy ads because doing so facilitated its ability to regulate express advocacy ads. *Wis. Right to Life*, 551 U.S. at 473-74. The Supreme Court rejected the FEC's argument, holding that "'Government may not suppress lawful speech as the means to suppress unlawful speech.'" *Id.* at 475 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)). The Court rejected a similar argument in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). There, the government justified its regulation of anonymous leafleting by asserting that the regulation "serve[d] as an aid to enforcement of" other, permissible provisions of the election code and as "a deterrent to the making of false statements by unscrupulous prevaricators." *McIntyre*, 514 U.S. at 350-51. The Court rejected the argument, holding that "[a]lthough these ancillary benefits are assuredly legitimate," they could not justify the leafleting regulation. *Id.* at 351. *See also Buckley*, 424 U.S. at 44 (rejecting the argument that the government could limit expenditures in order to maximize the effectiveness of less intrusive contribution limits).

There is no logical stopping point to the Ninth Circuit's holding. If the government may burden fully protected speech in order to more efficiently regulate speech that may constitutionally be restricted, then all speech is subject to regulation and no speech is

fully protected. However, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. Put another way, narrow tailoring does not permit the government to force a political player to lean into a pitch and "take one for the team." Narrow tailoring demands, at least, that the burdens of the law actually fall on those who give rise to the problem. The Matching Funds Provision does not do that.

4. The Matching Funds Provision Is Not Narrowly Tailored To Limit Corruption Deriving From Large Private Contributions To Candidates Because Arizona Has Banned Large Private Contributions.

This Court has concluded that limits on "large direct contributions" are permissible because such contributions could be given "'to secure a political *quid pro quo*'" *Citizens United*, 130 S.Ct. at 908 (quoting *Buckley*, 424 U.S. at 26). But the Matching Funds Provision cannot be a government effort to fight corruption caused by "large direct contributions" because there are no large contributions in Arizona state elections. Arizona has one of the lowest contribution limits for state races in the country. *See Randall*, 548 U.S. at 250-51. According to the National Conference of State Legislatures, as of 2010, Arizona limits statewide candidates to $840 per contributor

per election cycle and limits legislative candidates to $410 per contributor per election cycle.

It is difficult to understand why the speech of independent expenditure groups and privately financed candidates must be burdened in order to prevent the corrupting influence of contributions the largest of which cannot cover the cost of a laptop computer or an airplane ticket. To the extent that the Act is designed to combat the corruption derived from "large direct contributions," it is boxing a ghost. In that sense, burdening speech to prevent negative consequences associated with speech the state already severely limits is not narrow tailoring.

Comparing states' contribution limits over a two-year election cycle, Arizona's contribution limit for statewide candidates is, on a per capita basis, the second lowest in the nation, behind only Florida. *See* Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates* (Jan. 20, 2010), http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf (last visited Jan. 10, 2011); United States Census 2010, *Resident Population Data*, http://2010.census.gov/2010census/data/apportionment-pop-text.php (last visited Jan. 10, 2011). Using 2010 Census data, the ratio of Arizona's statewide contribution limit to the size of the constituency is .00013, far lower than the Vermont ratio of .00064 that this Court held unconstitutionally low in *Randall*. *See Randall*, 548 U.S. at 251-52.

B. The Matching Funds Provision's Overwhelming Purposes Were To Equalize Electoral Opportunities and Limit Spending In Campaigns and It Is Therefore Not Supported By a Compelling Governmental Interest.

If we begin, as this Court did in *Buckley*, by examining the Act's "primary purpose," the Matching Funds Provision falls. *Buckley*, 424 U.S. at 26. The Act's primary purposes were to (i) limit spending in campaigns, and (ii) level the playing field among political actors in Arizona. Neither interest is compelling. The method the Act uses to achieve these purposes is the Matching Funds Provision. That provision therefore fails.

In *Buckley*, this Court rejected the argument that the government may restrict campaign spending in order to reduce the costs of campaigns. Specifically, the Court held that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57. Arizona's interest in limiting spending therefore cannot justify the Matching Funds Provision's burdens on speech.

Arizona has even less success with its interest in "leveling the playing field" in state campaigns. As this Court held in *Davis*, it is a "dangerous business" for the government to attempt to influence the voters' choices by leveling electoral opportunities. *Davis*, 554 U.S. at 742. This interest not only fails to support the Matching Funds Provision's burden on speech, it is

not even a legitimate government interest in the first instance. *Id.* at 742. Because the Matching Funds Provision was designed to achieve a goal "wholly foreign to the First Amendment," *Buckley*, 424 U.S. at 48-49, it cannot survive in our constitutional system.

Of course, preventing corruption or the appearance of corruption are the only compelling governmental interests for restricting campaign finances. *Davis*, 554 U.S. at 740. Respondents and the Ninth Circuit therefore attempted to fit the Matching Funds Provision within the anti-corruption box. These efforts fail because the Matching Funds Provision is designed to limit spending by independent expenditure groups and privately financed candidates. Anti-corruption concerns cannot justify a law limiting independent expenditures or other spending that poses no threat of corruption. *See Citizens United*, 130 S. Ct. at 909; *Buckley*, 424 U.S. at 46. And the anti-corruption rationale cannot support restrictions on the ability of candidates to promote their own candidacies. *Davis*, 554 U.S. at 740-41; *Buckley*, 424 U.S. at 53.

To the extent that the Act is supported by a governmental interest in preventing corruption or its appearance, that interest is insufficient to justify the Matching Fund Provision's burdens on expenditures. That provision is therefore not supported by a compelling governmental interest and, to the extent that it is, that interest is insufficient to justify the level of harm to free speech rights caused by the law.

V. THE MATCHING FUNDS PROVISION FAILS INTERMEDIATE SCRUTINY.

The Ninth Circuit applied intermediate scrutiny to the Matching Funds Provision based on this Court's decisions regarding disclaimer and disclosure requirements in *Buckley* and *Citizens United*. App. 21, 23, 31-33. Even under intermediate scrutiny, however, the Matching Funds Provision is still unconstitutional. Intermediate or "exacting" scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (citing *McConnell*, 540 U.S. at 231-32, and *Buckley*, 424 U.S. at 64, 66). To survive this scrutiny, "there must be a relevant correlation . . . between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny. That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U.S. at 744 (internal quotation marks and citations omitted). Here, there is neither a sufficiently important governmental interest nor a substantial relation between the Matching Funds Provision and any legitimate government interest.

First, there is no governmental interest in preventing or even chilling independent expenditures. This Court has found that independent expenditures do not, as a matter of law, implicate corruption or the appearance of corruption. *Citizens United*, 130 S. Ct. at 908. "Limits on independent expenditures . . . have

a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption." *Id.* Thus, even if the Ninth Circuit were correct that the Matching Funds Provision causes "merely theoretical chilling," such chilling is not permissible as applied to independent expenditures.

Second, the Matching Funds Provision burdens the expenditures of candidates as well. Privately financed candidates face the burdens inherent in the Matching Funds Provision if they choose to spend more than a government-set expenditure limit. But, like independent expenditures, candidate expenditures—whether by self-funded candidates or supporter-funded candidates—do not, as a matter of law, implicate corruption or the appearance of corruption. *Buckley*, 424 U.S. at 52, 55. Moreover, in chilling expenditures by self-funded candidates, the Matching Funds Provision chills speech that actually "*reduces* the threat of corruption." *Davis*, 554 U.S. at 740-41.

Third, to the extent that Respondents seek to justify "leveling the playing field" as a "sufficiently important governmental interest," such an argument has been foreclosed since *Buckley*. *Buckley*, 424 U.S. at 54, 56-57. An attempt to "level the playing field" cannot support any governmental policy at all because it is illegitimate and brings with it "ominous implications." *Davis*, 554 U.S. at 742. Accordingly, "leveling the playing field" of political speech cannot be a legitimate government interest, much less an important one.

Finally, Matching Funds cannot be justified as a necessary inducement into a public funding scheme that itself "fights corruption." As set forth above, Matching Funds do not directly combat corruption or its appearance. Instead, as recognized by the Ninth Circuit, they can only be indirectly linked to the fighting of corruption. App. 34-35. Such an indirect relation to a legitimate government interest is not consistent with "exacting scrutiny" because it does not satisfy the "substantially related" test.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit below and permit to take effect the district court's order permanently enjoining Respondents from enforcing the Matching Funds Provision.

Respectfully submitted.

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